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VICE PRESIDENTIAL SUCCESSION: IN SUPPORT OF THE BAYH-CELLER PLAN

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A. Introduction

In the April, 1965, issue of the *South Carolina Law Review* there appeared an article by Professor George D. Haimbaugh, Jr., entitled "Vice Presidential Succession: A Criticism of the Bayh-Cellar [*sic*] Plan."[1] Professor Haimbaugh sought to demonstrate what he claimed was the "unreality" of certain arguments advanced in favor of the vice presidential succession feature of the proposed twenty-fifth amendment to the Constitution.[2] The arguments to which he addressed himself were "that this constitutional change is urgently needed, that the presidential initiative is necessary to insure continuity of executive policy, and that the requirements of congressional ratification will secure a proper voice to the representatives of the people."[3]

This article attempts to answer the criticisms made by Professor Haimbaugh by showing that they are invalid, inapplicable, and unrealistic.

B. The Truth of Urgency

Professor Haimbaugh states that the Vice Presidency has been vacant for thirty-nine out of 176 years of our existence under the Constitution due to the resignation of one Vice President, the death of seven and the succession of eight others.[4] He then

* Member, New York Bar; author of FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (Fordham University Press, 1965).

1. 17 S.C.L. REV. 315 (1965).

2. Section 2, the vice presidential succession provision, provides:
Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
The proposed amendment passed the House of Representatives by voice vote on June 30, 1965 (111 CONG. REC. 14668 (daily ed. 1965)), and the Senate by a vote of 68 to 5 on July 6, 1965 (111 CONG. REC. 15031-32 (daily ed. 1965)). The same basic measure previously had passed the Senate on February 19, 1965 by a vote of 72 to 0 (111 CONG. REC. 3203 (daily ed. 1965)), and the House on April 13, 1965, by a vote of 368 to 29 (111 CONG. REC. 7699 (daily ed. 1965)). As of this writing (December, 1965), it has been ratified by Wisconsin, Nebraska, Oklahoma, Massachusetts, Pennsylvania, Kentucky, Arizona, Michigan, Indiana, California, Arkansas, New Jersey, and Delaware.

3. 17 S.C.L. REV. 315 (1965).

4. John C. Calhoun resigned; George Clinton, Elbridge Gerry, William E. King, Henry Wilson, Thomas A. Hendricks, Garret A. Hobart, and James S. Sherman died; and John Tyler, Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman, and Lyndon B. Johnson succeeded.

says that the "dangers thus conjured up, however, fade away when existing constitutional and legal provisions are recalled," pointing to Congress' power to establish a line of succession and to the Succession Laws of 1792, 1886 and 1947 which were passed pursuant to this power.[5]

The existence of a line of succession beyond the Vice Presidency does not obviate the need for a Vice President in the least. Indeed, the present succession law demonstrates the need for a Vice President at all times.[6] There are objections of both policy and law to the 1947 Act which have been completely overlooked by Professor Haimbaugh.[7] From the standpoint of policy, the presence of the Speaker and President pro tempore, respectively, as the immediate successors after the Vice President leaves much to be desired.

First, it would permit a political party different from that of the President and Vice President to take control of the Executive in the event of the death, resignation or removal of both the President and Vice President. The possibility of a Congress dominated by a different party is by no means remote. For about eight of the thirty-seven years when there was no Vice President the immediate successor to the President was of the opposite political party. This was true for much of the time when Presidents John Tyler, Millard Fillmore and Harry S. Truman were serving out the terms of Presidents William H. Harrison, Zachary Taylor, and Franklin D. Roosevelt, respectively. During President Dwight D. Eisenhower's entire second term, Congress was controlled by the Democrats. Presidents William H. Taft, Woodrow Wilson and Herbert Hoover were confronted by Congresses controlled in one or both Houses by the opposite party.

Second, the experience of Speakers and Presidents pro tempore is almost strictly legislative in nature. Since they arrive at their positions of leadership after many years of service in Congress,

5. 17 S.C.L. REV. 315, 316 (1965).

6. The line of succession after the Vice President is as follows: Speaker of the House of Representatives, President pro tempore of the Senate, Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, and Secretary of Labor. 3 U.S.C. § 19 (1958).

7. Professor Haimbaugh is factually incorrect in saying that "there has always been at least half a dozen officers in the line of succession" since 1792. 17 S.C.L. REV. 315, 316 (1965). From 1792 to 1886 the line of succession beyond the Vice Presidency consisted only of the President pro tempore and the Speaker (see 1 Stat. 239 (1792)), and there were times when there was neither a President nor a Speaker. Moreover, Professor Haimbaugh errs in including the Secretary of Health, Education and Welfare in the present line of succession. This official has never been added to the line.

they are usually well on in years when they do so. Following the death of President John F. Kennedy the public clamor for a change in the present succession law and for a method of filling a vacancy in the Vice Presidency was due in large part to the ages of the Speaker, who was then seventy-one, and the President pro tempore, who was then eighty-six. There seemed to exist at the time a general feeling that considering the present day requirements of the Presidency, this law is impractical. Speakers and Presidents pro tempore are not selected for their positions with a view to possible succession to the Presidency. The same is not true of the Vice President.

From the legal standpoint, there is reason to believe that the present law is unconstitutional. First, there is real doubt as to whether the Speaker or President pro tempore is an officer of the United States. Professor Ruth C. Silva, who has studied this matter in great detail, states that "the Constitution does not contemplate the presiding legislative officers as officers of the United States" (as is required by the succession clause of the Constitution).[8] She adds that this view is "supported by all the commentators."[9]

Second, under the 1947 law, the Speaker and President pro tempore must resign their positions and seats in Congress in order to act as President in a case of presidential inability. Many constitutional authorities maintain that Congress can attach the powers and duties of the Presidency only to an existing office, which the occupant continues to occupy while acting as President.[10] The succession provision of Article II, Section 1 of the Constitution appears to support this by providing that the officer in the line of succession shall act as President "until the disability be removed, or a President shall be elected," implying that he is to retain his office while so acting.

In addition, the 1947 law provides that where a Cabinet officer acts as President, he may be superseded by a Speaker or President pro tempore. This is subject to objection because the Constitution provides that the officer appointed by Congress shall act "until the Disability [of the President or Vice President] be removed, or a President shall be elected." Therefore, the "officer"

8. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 463 (1949).

9. *Id.* at 464. See *e.g.*, Kallenbach, *The New Presidential Succession Act*, 41 AM. POL. SCI. REV. 931, 939-41 (1947); Wilmerding, Jr., Washington Post, December 8, 1963, p. 1, cols. 2-3.

10. Silva, *supra* note 8, at 464-66.

acting as President should not be replaced except by the President or Vice President whose disability had ended or by a newly elected President.

Clinton Rossiter, Professor of American Institutions at Cornell University and a noted authority on the Presidency,[11] said in his statement to the Subcommittee on Constitutional Amendments in 1964:

> I am bound to say in my opinion that the act of 1947 is a poor one, in many ways one of the poorest ever to emerge from this stately and distinguished body. I am not even sure . . . that it is a constitutional act, and sooner or later it will have to be amended, if not scrapped.[12]

He was of the view that:

> The problem of succession could best be solved, except in the most ghastly and unforeseen of circumstances, by providing some dignified and conclusive means of filling the Vice-Presidency whenever it has been vacated. If we could be sure that there would always, or almost always, be a Vice President, then we would not need to worry our heads too much over the really quite unanswerable question of whether the Secretary of State or Speaker of the House would make a better President.[13]

In view of the foregoing objections, if a Speaker or President pro tempore took over the duties of the Presidency under the 1947 law, there undoubtedly would be much confusion at the

11. Professor Haimbaugh fails to give the context of the quotations he extracted from Professor Rossiter's and Sidney Hyman's testimony before the Senate Subcommittee on Constitutional Amendments. 17 S.C.L. REV. 315, 318 and n. 16 (1965). The context would show that both men were registering their objections to the proposal of having two Vice Presidents at the same time. See *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary,* 88th Cong., 2d Sess., on S. J. Res. 13, S. J. Res. 28, S. J. Res. 35, S. J. Res. 84, S. J. Res. 138, S. J. Res. 139, S. J. Res. 140, S. J. Res. 143, S. J. Res. 147 at 181, 228 (1964) [hereinafter cited as *Hearings*]. Rossiter, who strongly favored the adoption of a method of filling a vacancy in the Vice Presidency (see text accompanying note 13, *infra*), said about the two Vice Presidents' proposal:

> [W]e have spent literally generations getting the Vice Presidency up to a place where it has real distinction, and first-class men are willing to accept it, as they certainly were not 50 or 60 years ago, and I think we ought to do everything within our power to keep it that way, and I think that to try to institute a second Vice President would get us right back to where we were before.

Hearings, supra, note 11, at 228.

12. *Hearings, supra* note 11, at 217.

13. *Id.* at 220.

time regarding his legal status, with the likelihood of challenge through the courts. Needless to say, this would not be conducive to stability when it would be most needed. On the other hand, under the proposed twenty-fifth amendment, there could not be any doubt whatever as to the legal status of the successor.

Professor Haimbaugh criticizes the view that the Vice Presidency is the "best apprenticeship" for the Presidency. He refers to the months of foreign travel spent by Vice Presidents Richard Nixon and Lyndon B. Johnson and concludes that the Vice Presidency has not become a "full-time 'chain of command' job."[14]

Since World War II, the United States has taken on an increasingly active role in world affairs. The recent policy of having the Vice President travel to foreign countries cannot be disassociated, as Professor Haimbaugh would have it, from the job of Vice President. This type of activity is not a waste of time but rather prepares the Vice President even more for the day when he might be called upon unexpectedly to lead the Nation. As the Nation's second officer, the Vice President, by word and deed, is in a position to improve the image of the United States abroad, and to acquaint himself with world problems by direct contact with the leaders and people of foreign countries. William White points out in his authoritative book on President Johnson that his foreign tours as Vice President

> were not good-will missions or the cornerstone-laying sort of thing. They were vital trips in which Johnson went for broader purposes than to estimate and to report on nearly all the foreign crises which arose in the almost three years of his vice-presidency. Kennedy gave his Vice-President wide powers to negotiate and to act on behalf of the United States.[15]

It cannot be disputed that for much of our history the Vice President was an anomaly. He had few duties to perform and seldom participated in the councils of government. Yet four times in the last century and four times in this century, Vice Presidents were suddenly called upon to serve as President when the President died. Each time the Vice President led the country through the crisis occasioned by the death of the President. During this century the death of William McKinley propelled Theodore Roosevelt into the Presidency; the death of Warren

14. 17 S.C.L. REV. 315, 317 (1965).
15. WHITE, THE PROFESSIONAL: LYNDON B. JOHNSON 232 (1964).

Harding, Calvin Coolidge; the death of Franklin Roosevelt, Harry S. Truman; and the death of John F. Kennedy, Lyndon B. Johnson. It is questionable whether any other office of succession could have provided comparable or better Presidents.

In judging the type of apprenticeship a person receives in the Vice Presidency, the present rather than the past, upon which Professor Haimbaugh places so much reliance, must be a guide. Today, the Vice President serves in the Cabinet and National Security Council. He participates in the inner councils of government in the making of the great decisions of the day. He is chairman of executive committees and overseer for the President of various government programs. He is President of the Senate, and, as such, a liaison between the Executive and Legislative Branches of Government. He represents and undertakes special assignments for the President abroad and at home. In brief, he has become a fully informed, consulted and working member of the Government.[16] There is no other officer in our Government who has the same opportunity to prepare himself for possible duty as President. Certainly the Speaker of the House of Representatives, who has scores of legislative duties to perform, is not in such a position.

Professor Haimbaugh states that "the possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger."[17] This criticism is wholly unjustified, since Congress now has the power to extend the line of succession. There is no reason whatever for a constitutional amendment to deal with this matter, since it can be done by statute. There is every reason for dealing with vice presidential succession by constitutional amendment, since Congress does not now have the power to fill a vacancy in the Vice Presidency. The proposed twenty-fifth amendment meets this danger.

C. Continuity

Professor Haimbaugh says: "the argument that the power to nominate a Vice President would be used by a President for the

16. The author describes the development of the Vice Presidency in his book, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1964). It is interesting to note that, after becoming President, Johnson asked Speaker McCormack to sit in on meetings of the National Security Council and "other key decision-making meetings" provided they were not "inconsistent with his legislative responsibilities." N.Y. Times, December 4, 1963, p. 24. His status as a member of Congress prevented him from receiving a Cabinet invitation.

17. 17 S.C.L. REV. 315, 332 (1965).

18. U.S. CONST. art. II, § 1, para. 6.

purpose of assuring continuity of executive policies does not square with American political history which demonstrates that a man seeking election or re-election to the Presidency wants a teammate who can strengthen the ticket with groups not too enthusiastic about the presidential nominee."[19]

This criticism is completely inapplicable. The proposed amendment does not deal with the selection of a running mate with a view to a forthcoming election, and there is thus no question of choosing the nominee on the basis of his ability to attract votes. The amendment, it should be stressed, deals with filling a vacancy in the Vice Presidency. Such a vacancy may result upon the happening of two sets of contingencies: (1) the death, resignation or removal of the President and the succession of the Vice President; and (2) the death, resignation or removal of the Vice President. Surely, at a time of death in office of either the President or Vice President, the President would nominate for Vice President a person of presidential timber, especially since the Nation's attention would be focused on the presidential qualifications of any nominee. There is no relevant experience to suggest the contrary.

There can be little quarrel with Professor Haimbaugh's statement that a presidential candidate "thinks in terms of a ticket-strengthening running-mate."[20] But, as recent history shows, he does not overlook the qualifications of his running mate to succeed to the Presidency. In recent elections only first-class men have succeeded in being elected Vice President. Professor Haimbaugh, unfortunately, omits some pertinent data in his account of recent national political conventions. Thus:

1952—In his memoirs, President Dwight D. Eisenhower says he recommended Richard M. Nixon for the Vice Presidency for these reasons:

> First, through reports of qualified observers I believed that his political philosophy generally coincided with my own. Next, I realized that before the election took place I would have attained the age of sixty-two. I thought we should take the opportunity to select a vice-presidential candidate who was young, vigorous, ready to learn, and of good reputation.[21]

19. 17 S.C.L. REV. 315, 333 (1965).
20. *Id.* at 326.
21. EISENHOWER, MANDATE FOR CHANGE: 1953-1956, at 46 (1963).

During the campaign Eisenhower indicated to Nixon that he believed the Vice President should be trained and prepared so as to be able to "take over the presidency smoothly and efficiently should the need arise."[22]

1960—In early 1960 John F. Kennedy said of Lyndon B. Johnson:

> I think I am equipped for the job [of President]. Lyndon Johnson is the only other man I can think of with the equipment for the job of President.[23]

Presidential candidate Richard Nixon favored Henry Cabot Lodge as his running mate

> not because he was from the East and I was from the West, nor because on some domestic issues his views were more liberal than mine, but because on the all-important issues of foreign policy we were in basic agreement. I felt that his experience in the Senate and at the United Nations qualified him to lead the Free World in the event that responsibility should come to him.[24]

1964—Time after time in the months leading up to his recommendation of a running mate, President Johnson said his criteria were: Who would serve "the best interests of the country and who would make the best President of the United States in the event he were called upon to be President?"[25]

The death of President Roosevelt, the attempted assassination of President Truman, the heart attack and strokes sustained by President Eisenhower, and the tragic assassination of President Kennedy have made the American people readily aware of the critical need for an able successor to the President, and a presidential candidate who failed to heed this in recommending a running mate would be inviting political disaster.

D. Congressional Confirmation

Professor Haimbaugh suggests that nomination of a Vice President by the President is less democratic than the present succession law, under which the "Speaker is elected to Congress

22. Nixon, "The Second Office," in 1964 YEAR BOOK, WORLD BOOK ENCYC., at 82.
23. *Newsweek*, December 2, 1963, p. 28.
24. Nixon, *supra* note 22, at 89.
25. N.Y. Times, April 24, 1964, p. 14.

by the people of his district and to the Speakership by the biennially elected representatives of the people of each of the congressional districts."[26] In giving the President the power to nominate a Vice President, the amendment is most practical and in no way inconsistent with American tradition. The method recognizes that the effectiveness of a Vice President depends almost completely on his relationship with the President. To achieve a good relationship, the Vice President and President must be of the same party and of compatible temperament and views. This is more readily assured under the proposed amendment than under any of the other proposals which were thoroughly considered by the Congress.[27]

That a new Vice President *might* not be an elected official, although it is likely that he would be, does not weaken the vice presidential provision of the amendment. It should be recalled that for over 135 years of our existence the immediate successor after the Vice President was not a person directly elected by the people. From 1792 to 1886, when Senators were chosen by state legislatures, the President pro tempore of the Senate was the immediate successor after the Vice President. From 1886 to 1947 the Secretary of State, an appointed official, was the immediate successor. Even the present succession law places the members of the Cabinet in the line of succession after the Speaker and President pro tempore.

The vice presidential provision of the proposed amendment subjects the President's nominee to confirmation not only by the Senate, as is the case under the Constitution with other presidential nominees, but also by the House of Representatives. Thus all congressional districts and all states have a voice in the selection of the new Vice President. In contrast to the regular presidential elections, where one cannot vote against a vice presidential candidate if he wants to vote for the presidential candidate, under the Bayh-Celler amendment the person nominated for Vice President must be judged solely on his own merits.

Professor Haimbaugh suggests that congressional confirmation would be nothing more than a formality. Yet it should be noted that the United States Senate has not been hesitant to disapprove presidential nominees who were not qualified for the office for which they were nominated.[28] It is unreasonable to

26. 17 S.C.L. Rev. 315, 326-27 (1965).

27. See 43 Cong. Dig. 136-37 (1964).

28. The recent action of the Senate in rejecting the nomination of Francis X. Morrissey for federal district court judge is in point.

assume that the United States Congress would not give careful consideration to the qualifications of a nominee for the Vice Presidency and, if it felt he were not qualified, to reject his nomination. In this connection, the proposed amendment provides that a nominee must obtain the votes of a majority of each House of Congress. Each House would meet and vote separately and could have such hearings and discussions regarding the nominee as it thought desirable. Accordingly, the presence of Congress under this amendment does guarantee an important role for the representatives of the people in the process of vice presidential succession.

E. Conclusion

Professor Haimbaugh's criticisms of the Bayh-Celler plan for vice presidential succession are not justified. A line of succession beyond the Vice Presidency is a guarantee against catastrophe. It is not a substitute for having a Vice President at all times. A major requirement for the Vice Presidency is the person's qualifications for the Presidency. The office of Vice President offers the best apprenticeship for possible succession to the Presidency. This Nation cannot rely upon a succession law under which those in the line of succession are chosen almost exclusively on the basis of their qualifications for other positions as a substitute for a Vice President at all times.

The proposed twenty-fifth amendment deals with not only vice presidential succession but also the problem of presidential inability which has long been in need of solution.[29] No one claims that this amendment is perfect, covering every possible contingency. Indeed, no such claim was made on behalf of the Constitution itself. The following words of Benjamin Franklin, uttered at the Constitutional Convention of 1787, are appropriate:

> I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us. . . . I doubt . . . whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opin-

29. The author discusses the amendment and its background in *The Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy,* 41 A.B.A.J. 915 (October, 1965); *The Proposed Twenty-Fifth Amendment to the Constitution,* 34 FORDHAM L. REV. 173 (1965).

> ion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonished me . . . to find this system approaching so near to perfection as it does. . . . Thus I consent . . . to this Constitution because I expect no better, and because I am not sure, that it is not the best. . . . I cannot help expressing a wish that every member . . . who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility. . . . [30]

There is no other amendment to the Constitution which has been as thoroughly considered as the proposed twenty-fifth amendment. It is, as Walter Lippmann so well stated, "a great deal better than an endless search . . . for the absolutely perfect solution . . . which will never be found, and . . . is not necessary."[31] The problems with which it deals involve the Nation's security. To leave these problems unsolved is to trifle with that security!

30. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642-43 (Farrand ed. 1911 & 1937).

31. N.Y. Herald Tribune, June 9, 1964, p. 20.